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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 754

W. P. SEWELL AND R. B. SEWELL, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. F. COLLADAY,
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Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

W. P. Sewell and R. B. Sewell respectfully pray for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case. Since for present purposes the cases of the two Petitioners are identical, we shall, for simplicity, refer only to the case of W. P. Sewell, whom we shall refer to as Petitioner.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on November 9, 1945, and has not yet been reported. (R. 269.) The opinion, consisting of only two paragraphs, appears as Appendix A to this petition.

The judgment below affirms the decision of the Tax Court of the United States, which is not reported. (R. 52, 96.)

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 9, 1945. (R. 270.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347.)

THE QUESTION PRESENTED.

Is Petitioner liable for income taxes on dividends on stock declared and paid in 1935, 1936 and 1937, notwithsatnding the fact that a State Court of competent jurisdiction, with the Petitioner and his wife and the Company before it, had decreed that Petitioner had in 1934 by valid and completed gift, without reservation, restriction or limitation, transferred the stock to his wife and that thereafter he had no interest in same?

STATUTES INVOLVED.

Revenue Act of 1934, c. 277, 48 Stat. 680:

"Sec. 11. NORMAL TAX ON INDIVIDUALS.

"There shall be levied, collected, and paid, for each taxable year upon the net income of every individual, a normal tax * * *."

"Sec. 12. RATE OF SURTAX ON INDIVIDUALS.

"(b) There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual, the surtax shown in the following table: * * *"

"Sec. 22. GROSS INCOME.

"(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, or from professions, vocations, trades, businesses, commerce, or sales,

> or dealings in property, whether real or personal, growing out of ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *."

The corresponding provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Fifth Circuit erred:

(1) In holding that Petitioner is liable for income taxes on dividends on stock notwithstanding the fact that a State Court of competent jurisdiction, with Petitioner and his wife and the Company before it, had decreed that Petitioner had, prior to the declaration and payment of such dividends, by valid and completed gift, without restriction, reservation or limitation, transferred the stock to his wife.

(2) In refusing to remand the cases to the Tax Court in order that the State Court decree might be introduced in evidence before that Court and the case decided by that Court in the light of the State Court decree.

(3) In failing to hold that the Tax Court, in concluding that the Petitioner retained such "dominion and control" as would defeat a gift, improperly confused with dominion and control in the husband those prerogatives exercised by a husband solely by reason of a continuing cordial marital relationship where the will of the donee is under no restraint and where actual dominion and control is vested fully in the wife. Cf. *Richardson* v. *Smith*, 102 F. (2d) 697.

STATEMENT OF THE CASE.

On October 11, 1944, the Tax Court held that Petitioner was liable for income taxes on dividends paid on certain stock during the years 1934, 1935, 1936 and 1937. The Tax

Court based its holding solely upon the premise that the Petitioner had not, as he contended, made a valid and completed gift of the stock to his wife in 1934. (R. 65.)

Subsequently, in February, 1945, the General Assembly of the State of Georgia enacted a Declaratory Judgment Act, whereupon suit was brought by the wife against Petitioner and the corporation paying the dividends.[1] In this suit a decree was rendered that, in 1934 (before the declaration of most of the dividends in question), Petitioner had made a valid and completed gift of the stock to his wife without any restriction, reservation, or limitation, and that Petitioner has at no time since had any right, title or interest in or to said stock.

Thereupon, Petitioner filed in the Circuit Court of Appeals his motion to remand to the Tax Court in order that Petitioner might there introduce in evidence the State Court decree and that the Tax Court might then determine, in the light of the State Court decree, the question of Petitioner's liability for income taxes for dividends paid. The Circuit Court denied Petitioner's motion, placing its denial squarely on the ground that the decree of the State Court determining the ownership of the stock in a suit between the parties is not binding for Federal income tax purposes.

The Commissioner did not urge, in the Circuit Court, that the State Court decrees were untimely and that, *for that reason,* the motions to remand should be denied. Likewise, the Circuit Court itself did not rest its decision upon the ground of the untimeliness of the State Court decrees. The Commissioner urged below, and the Circuit Court held, that the motions should be denied upon the broad ground that *a State court decree determining ownership cannot bind the*

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[1] By an Act of the General Assembly of the State of Georgia, approved February 12, 1945 (Georgia Laws 1945, p. 137), Georgia courts were vested with jurisdiction to render declaratory judgments. Prior to the Act of 1945 the Georgia courts possessed no such jurisdiction. *Southern Railway Co.* v. *State of Georgia,* 116 Ga. 276. Because of this lack of jurisdiction, Petitioner could not have instituted proceedings for a declaratory judgment until after the decision of the Tax Court in 1944.

Tax Court and that the taxpayer was therefore liable for taxes on dividends on the stock, notwithstanding the State Court decree adjudging the stock to be the absolute property of the Petitioner's wife.[2]

The Commissioner also urged among other things in the court below that the decree of the State Court was, in effect, a consent decree and is for that reason to be denied any effect. The court below did not proceed upon any such theory and that is not an issue here in considering the correctness of the sweeping principle laid down by the court below.[3]

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[2] The effect of a decision based on the untimeliness of the State Court decree would be entirely different from the effect of a decision based on the broad ground that the State Court decree is not binding in any event. A decision based on the untimeliness of the State Court decree would not be binding in a suit involving the taxability of dividends for 1938 and subsequent years, whereas the decision of the court below may have this very serious consequence, notwithstanding that the Government seems prepared to admit that the State Court decree should affect the taxation of income subsequently realized. (Government Brief below, pp. 46, 47.)

[3] In his brief in the court below (p. 44), the Commissioner urged that, if the Court should consider the State Court decree material, the Commissioner would then be entitled to an opportunity in the Tax Court to challenge the circumstances under which the decree was obtained. This the Petitioner conceded, and Petitioner was prepared to show that the decree represents the considered judgment of the State Court, and that it was in no sense a consent decree. Even if the suit could be said to be "non-adversary", that was true of the decrees in the cases of *Helvering* v. *Rhodes' Estate*, 117 F. (2d) 509 (C. C. A. 8th), and *Eisenmenger* v. *Commissioner*, 145 F. (2d) 103, 107 (C. C. A. 8th), with which conflict is alleged, pages 8 and 9, *infra*. See also *Freuler* v. *Helvering*, 291 U. S. 35, and *Blair* v. *Commissioner*, 300 U. S. 5. An attack on this ground would challenge much of the solemn judicial proceedings of all lower State and Federal courts.

While perhaps this is not the place to pursue the matter further, it may be stated that the declaratory decree was entered in proceedings where the State Court, sitting without a jury, determined the issue of whether a valid gift of stock was effected in 1934 upon the fullest presentation of conflicting contentions. The State Court had properly before it (1) all evidence and briefs which were before the Tax Court in the present suit, and (2) all of the evidence just previously submitted before the same State

REASONS FOR GRANTING THE WRIT.

1. The decision below involves an important question of Federal tax law which the court below decided contrary to decisions of this court. The court below held that the judgment of a State Court having jurisdiction of the parties determining the ownership of property during the tax years in question is not binding on the Tax Court in determining to whom the income from the property is to be taxed. This Court has uniformly held that where a State court has settled the ownership of property, its judgment is binding upon taxing authorities where the question of the ownership of the property becomes material in a tax case. *Blair* v. *Commissioner,* 300 U. S. 5; *Freuler* v. *Helvering,* 291 U. S. 35.

Concededly, the interpretation of taxing statutes is a Federal question not controlled by the decision of a State Court But Federal taxing statutes have not superseded the function of the State Courts to determine the ownership of property in a suit between its citizens brought before such courts, and the decree of a State court with respect to the ownership of the property in litigation before it is final and conclusive of that question for Federal tax purposes as well as for other purposes.

In only one case has the doctrine laid down in the *Blair* and *Freuler* cases, *supra,* been challenged. In *Sharp* v. *Commissioner,* 91 F. (2d) 802, 803, 804 (C. C. A. 3rd), the

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Court in a sharply contested suit by First National Bank of Atlanta, as trustee, against the Sewell Manufacturing Company and Mrs. Ava F. Sewell. In the bank suit, the bank asserted, as does the Commissioner here, that the alleged gift in 1934 was not a valid completed gift and that the stock remained the property of the husband. It is apparent from the records in the State Court proceedings, which were before the court below (R. 214-241), and from the motion to remand (R. 183-190) that the proceedings in the State Court fully placed before that Court for its considered decision the question of the validity of the gift and the subsequent ownership of the stock.

Third Circuit Court of Appeals held that property, though held by the State Court decree to have been transferred by the decedent, was includible in the decedent's estate for tax purposes notwithstanding the State Court decree. This Court reversed the decision of the Third Circuit, *per curiam,* simply citing the *Blair* and *Freuler* cases. *Sharp* v. *Commissioner,* 303 U. S. 624.

While the language of the court below in the present case is not identical with that of the Third Circuit Court of Appeals in the *Sharp* case, it is significant that neither court cited an authority nor made any attempt to reason out the result reached or to justify the inconsistency of that result with the *Blair* and *Freuler* cases and that each court disposed of the question in one short paragraph and that each court apparently was oblivious of the fact that the decision rendered by it was in clear conflict with decisions of this Court and of other Circuit Courts of Appeals. The portions of the two opinions dealing with the State court judgments are set out in full in parallel columns in Appendix B hereto, page 20, *infra.*

It is worthy of note that the Government did not oppose the granting of the writ of certiorari in the *Sharp* case.[4] We do not see how it can well justify opposition to certiorari in the present case. Unless this Court is now prepared to depart from the principle laid down by it in the *Blair, Freuler* and *Sharp* cases, the judgments of the State Court must here be given like controlling effect, and the decision of the court below must be reversed. We assume that the Government would concede that, even if the principle laid down in the *Blair, Freuler* and *Sharp* cases is now to

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[4] The Solicitor General's memorandum brief on the merits in this Court in the *Sharp case* (No. 558, Oct. Term, 1937) concluded:

> "We, therefore, are of the opinion that the Board of Tax Appeals should have followed the decree of the State Court. But out of deference to the views of the Board and the Circuit Court of Appeals for the Third Circuit, the Government does not confess error. Instead, it is respectfully submitted for such disposition as the Court thinks meet."

be overturned, it should be by a decision of this Court, and not by a decision of a Circuit Court of Appeals which deals with the question only summarily, referring to none of the opinions of this Court or of other Circuit Courts of Appeals analyzing the problem.

2. The decision below is in conflict with decisions in the Eighth Circuit in which it was held that the judgment of a State court of competent jurisdiction with respect to the ownership of property is conclusive upon the Tax Court and upon courts to which the decision of the Tax Court is appealed. *Eisenmenger* v. *Commissioner*, 145 F. (2d) 103, 106, 107 (C. C. A. 8th); *Hubbell* v. *Helvering*, 70 F. (2d) 668, 669 (C. C. A. 8th); *Helvering* v. *Rhodes' Estate*, 117 F. (2d) 509, 510 (C. C. A. 8th). The Board of Tax Appeals itself has given like conclusive effect to a State court judgment determining the ownership of property. *Louise Savage Knapp*, 46 B. T. A. 846, 854; *James T. Pettus*, 45 B. T. A. 855, 861. The decision below is also in conflict with the decision of the Sixth Circuit in the case of *Nashville Trust Co.* v. *Commissioner*, 136 F. (2d) 148 (C. C. A. 6th), which holds to be binding upon the Tax Court a decree of a State court of competent jurisdiction that property received from an estate was received as compensation for services and not as a bequest.

Even if there be read into the sweeping principle laid down by the court below a limitation, not therein expressed, that the rule is applicable only to cases where, as here, the State court decree is based upon issues of fact rather than upon issues of State law, still the decision below would be in square conflict with decisions of the Eighth Circuit in *Helvering* v. *Rhodes' Estate*, *supra*, and of the Sixth Circuit in *Nashville Trust Co.* v. *Commissioner*, *supra*, in which it was held that a State court decree is conclusive, though based upon issues of fact and not upon issues of State law. In its brief in the court below the Government conceded that a de-

cision based upon this distinction would be in conflict with the *Rhodes' Estate* case, *supra*.[5]

3. If the decision below should be interpreted as holding that the decree of the State Court is binding upon the Tax Court on the question of ownership of the property, but that ownership does not determine taxability of the income from the property, the shocking nature of the decision and the importance of the question involved would obviously demand the granting of the writ.

Never before, so far as we are aware, has it been held that where one makes a valid and completed transfer of property, without restriction, reservation or limitation (as the State Court has here held to be the case), the transferor is liable for income subsequently received by the transferee from the property so transferred. We have been loath to believe that the court below intended, without analysis, discussion or citation of authority, to introduce into the law any such novel proposition. We have assumed rather that the decision was intended only to deny to the State Court judgment the force which the decisions of this Court and of other Circuit Courts of Appeals have attributed to such judgments *in determining ownership*.[6] If, however,

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[5] In its brief in the Court below the Government said (pp. 54-55):

> "With one exception, the other cases cited by the taxpayer may be dismissed with the observation that none of them appears to have held that a federal court must accord any weight to a state court judgment turning on a question of fact. That one exception is *Helvering* v. *Rhodes Estate*, 117 F. (2d) 509 (C. C. A. 8th), where the United States Circuit Court of Appeals for the Eighth Circuit affirmed the decision of the Board of Tax Appeals that the prior decree of a state court as to ownership of property should be given effect in determining the incidence of the federal estate tax, although the judgment turned on a question of fact. We think that the decision was erroneous."

[6] The language of the Third Circuit Court of Appeals in its opinion in the *Sharp* case, *supra*, suggests more strongly than the language of the court below an intention to lay down the broad

it stands for the more sweeping proposition, clearly certiorari should be granted.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted. It is believed that there has been shown a clear conflict of the decision below with the decisions of this Court and other

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proposition that complete legal ownership of property and taxability of the income therefrom may be divorced. Nevertheless, in the presentation of the *Sharp* case to this Court, the parties did not interpret the decision of the Third Circuit as involving this question; and this Court, in reversing the *Sharp* case *per curiam*, simply cited the *Blair* and *Freuler* cases. However, the language in the case of *Loggie* v. *Commissioner* (CCA 5, decided December 10, 1945, not yet reported, copied as Appendix C to this Petition, page 21, *infra*) again suggests an intention on the part of the Fifth Circuit to assert some such novel proposition.

The respondent in the court below did assert some such proposition, relying upon such cases as *Helvering* v. *Clifford*, 309 U. S. 331; *Harrison* v. *Schaffner*, 312 U. S. 579; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Stuart*, 317 U. S. 154; *Douglas* v. *Willcuts*, 296 U. S. 1; *Argo* v. *Commissioner*, 150 F. (2d) 67 (C. C. A. 5th) (cert. den. November 5, 1945); *Doll* v. *Commissioner*, 149 F. (2d) 239 (C. C. A. 8th) (cert. den. October 8, 1945). The Circuit Court in the *Loggie* case, *supra*, relies upon the first three of the cases just cited. None of these cases suggests that where, as here, one transfers property outright to another the grantor remains taxable on the income thereafter accruing from the property.

The present case presents no situation of a short term trust for the benefit of a wife, with reversion to the settlor-trustee, he being meanwhile vested with control over the res and vested with absolute discretion as to payment of income to the beneficiary. *Helvering* v. *Clifford*, *supra*. Nor does this case present a situation where a taxpayer makes an assignment of income certain shortly thereafter to be paid. *Harrison* v. *Schaffner*, *supra*; *Helvering* v. *Horst*, *supra*. Nor does this case present a situation of a trust by a husband to discharge legal obligations to a divorced wife or to children of the taxpayer, the taxpayer reserving extensive powers of control over the trust res and distribution of income. *Helvering* v. *Stuart*, *supra*; *Douglas* v. *Willcuts*, *supra*. Nor does this case present a situation of a family partnership where a husband makes his wife a partner in an enterprise, the income of which is earned by the husband's labor and, by virtue of the partnership arrangement, divided with his wife. *Argo* v. *Commissioner*, *supra*; *Doll* v. *Commissioner*, *supra*.

Circuit Courts of Appeals upon an important question of Federal tax law.

It seems appropriate, however, to discuss briefly in the following Brief in Support of Petition certain questions which may arise in the mind of the Court or may be raised by the Solicitor General, should he oppose the granting of the writ.

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OCTOBER TERM, 1945.

No. .....

W. P. SEWELL and R. B. SEWELL, *Petitioners*,

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

A brief statement of the principles underlying the cases with which the decision below conflicts will make it clear that the principles asserted do not represent any invasion by the State courts of the jurisdiction of the Tax Court or other Federal courts called upon to determine who is taxable upon the income of certain property.

The binding force of a State Court's judgment does not arise from any supposition that the State Court is a higher authority than the Tax Court, or that the State Court has any right to control the Tax Court by reviewing a holding of the Tax Court or by making a determination as to the

taxability by the Federal Government of any income. Clearly, no State court has any such authority.

The binding force of a State court judgment as to the ownership of property arises from the fact that Federal tax law itself makes taxability of income depend on ownership and that ownership can generally be finally determined only by a state tribunal having the claimants before it. In taxing the income from property to the owner, Congress did not undertake to change the tests or principles which are applicable under laws of the several States for the determination of ownership, or to displace the tribunals usually charged with the determination of ownership. For example, a devisee claiming under a will is taxed on the income subsequently derived from the devised property if, but only if, the devise effectively vests the property in him. If the court of that State in a proper proceeding and with the parties in interest before it should hold the will invalid for any reason of law or fact, the devisee will not be taxed with the income since he never became the owner of the property.

The judgment of the State Court therefore is ultimately decisive of the tax question in such a situation, because Congress has provided that income from property shall be taxed to the owner and because Congress contemplated that ownership will be established in accordance with State law. Congress did not contemplate that income from property held by a tribunal having jurisdiction over the parties to be the property of A will be taxed to B who is not entitled to the property or to the income therefrom. This must be so, since the decision of the Tax Court will in no way help to sustain a claim by B to the property or to the income.

The court below in the last sentence of the opinion denying the motion to remand (page 18, *infra*) suggests that the State Court judgment is not determinative of taxability because it may conceivably have been based upon estoppel or laches or acceptance of benefits or rights of third parties, and, consequently, binding between the parties but not

against the Federal government. No such issue was presented in the State Court proceedings, nor did the Government make any such contention in the court below. It is true that a person may be estopped for reasons of fairness from claiming the ownership of property which is legally his, or he may by laches lose the right to insist upon some right to which he is entitled. But clearly no such question, nor any other question of the character suggested by the last sentence of the opinion of the court below, is posed by the decree of the State Court here under consideration. The State Court record (R. 227-241) clearly indicates that that case presented no question except whether a bona fide gift of stock was actually made from husband to wife in 1934 and whether the wife thereafter remained the absolute owner of the property, and that the decree of the State Court determined that question and only that question.

The action of the Federal courts in giving effect to State law and to the decisions of State courts in matters such as the ownership of property which Congress has left to the States is in no way inconsistent with decisions of the Federal courts ignoring State court decisions in fields in which Congress has clearly intended that Federal law should prevail.[7]

A State Court decree has no less weight because the same question has previously been decided differently by the Tax Court. This was true in the *Blair* case, *supra*, and in *Eisenmenger* v. *Commissioner*, *supra*, and in *Hubbell* v. *Helvering*, *supra*. This, we submit, is not an invasion of the jurisdiction of the Tax Court, but an incident of our judicial structure in a Federal system where one court can only collaterally consider a question of ownership

[7] Thus State nomenclature is disregarded in determining whether property was received by "inheritance." *Lyeth* v. *Hoey*, 305 U. S. 188; whether a power of appointment was a "general power of appointment," *Morgan* v. *Commissioner*, 309 U. S. 78; or whether property was a "future interest"; *United States* v. *Pelzer*, 312 U. S. 399; and in many similar situations.

as between private parties when such consideration is required in a Federal tax matter involving one of the parties, whereas the other court in a case properly brought before it can finally settle in fact and law the rights of the parties in the property.

In two of the cases frequently cited herein, *Blair* v. *Commissioner, supra,* and *Rhodes' Estate, supra,* the courts have considered and rejected the argument for the Commissioner that the acceptance of the decrees of the State Courts would make possible a loss to the Federal revenue through fraud or collusion. See also the discussion of this question by the Circuit Court of Appeals for the Seventh Circuit when the *Blair* case was before it. *Commissioner* v. *Blair,* 83 F. (2d) 655.[8]

A similar line of argument was urged upon and rejected by this Court in *Vanderbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, in reversing and remanding the case in order that the lower Federal Court might give consideration to a

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[8] After holding that it was bound to follow a State court interpretation of the character of a trust, even though it had previously decided the issue otherwise, the Circuit Court in the *Blair* case stated (at p. 657):

> "The correctness of our conclusion is not entirely free from doubt. We would be better satisfied if the suit in the state court had been more adversary in its nature. There is that which suggests a friendly suit to avoid taxes, to which there was no opposition or adverse party. * * * In other words it was not unlike a consent decree. But consent decrees are binding if entered by a court of competent jurisdiction with the parties properly before it, in the absence of a showing of collusion between the parties or fraud upon the court. The record before us does not show either collusion or fraud, save by circumstances which are also consistent with good faith on the part of the litigants. We, therefore, accept the Illinois Appellate Court decision as controlling upon the nature of this trust."

State Court decision rendered subsequent to the decision there on appeal.[9]

We have stated above (page 4) that the Government in the court below did not urge that the judgment of the State court should be denied effect because it was untimely, and the court below clearly did not place its decision upon any such ground. Therefore, certainly no such contention would be now appropriate. But if any such issue should be raised the answer would seem to be that where an issue relating to a taxpayer's liability is properly brought into a case on appeal, which issue was not urged in the Tax Court and which could not have been urged when the case was tried in that Court, the appropriate procedure is to remand to the Tax Court for further evidence and consideration upon the new issue. *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561. Cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, *supra*.

In a number of the cases cited where State court judgments have been held conclusive in Federal tax proceedings, the State court judgments were not rendered until after a controversy with the Commissioner had arisen. In the *Blair* case, *supra*, the decision of the Board of Tax Appeals had become final before

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[9] Mr. Justice Reed, speaking for the Court, said (at p. 543):

> "Respondent earnestly presses upon us the desirability of applying the rule that appellate courts will review a judgment only to determine whether it was correct when made; that any other review *would make the Federal courts subordinate to State courts* and their judgments subject to changes of attitude or membership of state courts, whether that change was normal or *induced for the purpose of affecting former federal rulings*. While not insensible to possible complications, we are of the view that, *until such time as a case is no longer sub judice*, the duty rests upon Federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent Federal and State interpretations of state law." (Emphasis supplied.)

the State court suit was filed; but the Board decision was held not to be *res judicata* when the State court judgment was introduced in a proceeding for a later year. The same was true in *Hubbell* v. *Helvering, supra.* In the *Freuler* case, *supra,* the State court judgment held controlling was rendered in a proceeding instituted after petition had been filed with the Board of Tax Appeals. In the *Eisenmenger* case *supra,* the Board of Tax Appeals granted a rehearing to admit a State court judgment rendered after the decision of the Board.

Respectfully submitted,

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Wilton H. Wallace,
W. A. Sutherland,
Counsel for Petitioner.

January 16, 1946.

APPENDIX A.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 11373.

W. P. SEWELL, *Petitioner*,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

R. B. SEWELL, *Petitioner*,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petitions for Review of Decisions of the Tax Court of the United States

(District of Georgia).

(November 9, 1945.)

Before SIBLEY, McCORD, and WALLER, Circuit Judges.

WALLER, Circuit Judge: The question involved here is one of intent, that is, whether or not the petitioners intended to make a completed gift *inter vivos* of the corporate stock to their respective wives, or whether the stock was placed in their wives' names only for tax purposes with the alleged donors retaining the same dominion and control as if there had been no transfer. There are ample facts in the record to justify the factual finding by the Tax Court that the donors merely intended to accomplish the latter purpose. Under *Dobson* vs. *Commissioner of Internal Revenue*, 320 U. S. 489, the findings of fact by the Tax Court should not be disturbed.

The petitioners' motion to remand the case to the Tax Court for consideration by the Tax Court of a declaratory decree of the state court of Georgia rendered since the decision by the Tax Court, in which declaratory decree the state court held that there had been completed gifts of the stock by the petitioners to their wives, is denied. A decision of the state court is binding between the parties in the settlement of their legal rights *inter sese*, but the income tax consequences of such transactions are for the Tax Court. Estoppel, laches, acceptance of benefits, rights of third parties, are incidents that might affect the decisions of the state courts in a contest between the parties, which would have no bearing in a controversy between the parties and the United States over income taxes imposed by virtue of a Federal Statute.

The motion to remand is denied and the case is Affirmed.

APPENDIX B.

Sharp v. *Commissioner*,
91 F. (2d) 802, 803-804

The second question is whether certain items of property were part of the decedent's estate or of a trust estate which he had created. This is determined by a fact finding which the Board has made against the taxpayers. By this we are bound. The question was, however, raised between the estate and the trust estate, and a state court of competent jurisdiction ruled that the property in question belonged to the trust estate. It, of course, follows that this property formed no part of the decedent's estate. We are, however, concerned not with the question of ownership but with a question of tax liability. The ruling is not technically res adjudicata against the taxing authorities because it might well be that as between distributees claiming through a decedent's estate and others claiming through a trust estate the decision might go to the latter, yet the same property might be held to belong to the decedent's estate for tax purposes. This property is taxable.

Sewell v. *Commissioner*,
(R. 269-270)

The petitioners' motion to remand the case to the Tax Court for consideration by the Tax Court of a declaratory decree of the state court of Georgia rendered since the decision by the Tax Court, in which declaratory decree the state court held that there had been completed gifts of the stock by the petitioners to their wives is denied. A decision of the state court is binding between the parties in the settlement of their legal rights inter sese, but the income tax consequences of such transactions are for the Tax Court. Estoppel, laches, acceptance of benefits, rights of third parties, are incidents that might affect the decisions of the state courts in a contest between the parties, which would have no bearing in a controversy between the parties and the United States over income taxes imposed by virtue of a Federal Statute.

(There is here set forth the full opinion in each case on the issue involving the State court judgments.)

APPENDIX C.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 11449.

RUBY ALTA LOGGIE, *Petitioner*,

VERSUS

W. A. THOMAS, Collector of Internal Revenue for the Second Collection District of Texas, *Respondent*.

Appeal from the District Court of the United States for the Northern District of Texas

(December 10, 1945)

Before SIBLEY, McCORD, and WALLER, Circuit Judges.

WALLER, Circuit Judge: The chief question involved in this case is whether or not a declaratory judgment of a state court, rendered after a federal income tax liability had accrued, in a case in which neither the Collector nor the Commissioner of Internal Revenue was a party, is res judicata in a suit in the Federal Court involving such income tax liability.

The income tax consequences to donors or to trustees are not always controlled by the sole incidence of the naked legal title. See Helvering, Commissioner v. Clifford, 309 U. S. 331; Helvering, Commissioner v. Horst, 311 U. S. 112; Harrison v. Schaffner, 312 U. S. 581; Dupont v. Com. Int. Rev., 289 U. S. 685. The fact, therefore, that the state court has rendered a declaratory judgment in reference to the legal title to property as between trustee and cestuis que trust does not foreclose an inquiry as to the liability of the trustee for taxes on the income from the same property involved in the state court judgment. See R. B. Sewell v.

Commissioner of Internal Revenue, decided by this Court on November 9, 1945, and not yet officially reported.

The Appellant still had the power to use and control the income according to her own discretion, and under the applicable decisions she is liable for the tax as held by the Court below.

The judgment is affirmed.

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CITATIONS

682051—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 754

W. P. SEWELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

R. B. SEWELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 52–96) is not officially reported. The opinion of the Circuit Court of Appeals (R. 269–270) is reported at 151 F. 2d 765.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1945. (R. 270.) The petition for a writ of certiorari was filed on January 16, 1946. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The Tax Court decided that purported gifts of income producing property had not relieved the taxpayers from liability for the tax imposed on income by Sections 11 and 22 (a) of the Revenue Acts of 1934 and 1936. In proceedings instituted thereafter, a state court declared that the gifts were valid. The question is whether the Circuit Court of Appeals erred in refusing a remand to the Tax Court for consideration of the action by the state court.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 11. NORMAL TAX ON INDIVIDUALS.
>
> There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.
>
> * * * * *
>
> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * professions, vocations, trades, businesses, commerce,

> * * * or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, * * * dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

The corresponding provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical.

STATEMENT

In the Tax Court the taxpayers [1] contended that they were not taxable on income derived from shares of stock in the Sewell Manufacturing Company,[2] a Georgia corporation, on the ground that they had earlier given those shares to their respective wives. The Tax Court made exhaustive findings (R. 54–65) with regard to the circumstances of the purported gifts, and to the sub-

[1] The Tax Court found the facts in the cases of the present taxpayers together with the facts in the companion case of R. A. Sewell. The cases of the present taxpayers were docketed and decided together in the court below (R. 270), and the case of R. A. Sewell was docketed and decided separately.

[2] The bulk of the income in dispute was in the form of dividends declared by the company on the stock, and credited on its books to the accounts of the wives. (R. 57–58.) The balance consisted of interest credited by the company on dividends allowed to stand on the books of the company in the name of the wife of R. B. Sewell. (R. 73–74.) As the Tax Court held (R. 74), and as the taxpayers have conceded in the court below, identical questions are presented by all items.

sequent dealings by the taxpayers in the subject matter thereof. It found as a fact (R. 64) that—

> None of the stock transfers in question were intended by the * * * [taxpayers] to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name. Completed gifts of the stock certificates so transferred were not made.

By a decision entered on October 11, 1944 (R. 97), the Tax Court sustained the Commissioner's determination that the income in dispute was taxable to the taxpayers. Petitions for review of the decision of the Tax Court were filed in the court below on January 9, 1945. (R. 98, 104.)

In August of 1945, the taxpayers moved in the court below that their cases be remanded to the Tax Court for consideration of decrees rendered by the Superior Court of Haralson County, Georgia, in proceedings instituted in June and July of that year. It appears that the state court proceedings relied upon by both taxpayers are substantially the same for present purposes. We shall, therefore, set forth a summary of that relied upon by W. P. Sewell to illustrate both.

The record of the state court proceedings (R. 199–261) sets forth only pleadings and orders, and

does not include a transcript or statement of the evidence in the state court.

On June 2, 1945, W. P. Sewell assigned to the First National Bank of Atlanta, hereinafter called the bank, as trustee for Mrs. Willie C. Sewell and others,[3] 100 shares of the common capital stock of the Sewell Manufacturing Company. (R. 185, 214) These shares were part of a larger block of 950 shares which, according to his argument in the Tax Court, the taxpayer had given to his wife, Ava F. Sewell, early in 1934. (R. 55.)

On June 21, 1945, the bank brought suit in the state court for a declaratory judgment against the company and the wife of W. P. Sewell. (R. 214–216.) The company asked for judgment that (R. 216)—

> * * * petitioner is the owner of said one hundred (100) shares of stock of Sewell Manufacturing Company; that Sewell Manufacturing Company be directed to issue a certificate for said stock to your petitioner and that it be ordered and adjudicated that Mrs. Ava F. Sewell has no right, title or interest in or to said one hundred (100) shares of stock and that your petitioner have such other and further relief as in the premises are proper.

On July 18, 1945, the wife filed an answer in the state court denying the material allegations of

[3] We have not been informed either as to the relationship of these persons to the taxpayers, or as to the terms of the trust.

the bank's petition, and on the same day the company did likewise. (R. 220–222.) The case went to trial before a jury, and on July 19 the jury returned its verdict (R. 225) that—

> We the Jury find in the issue for the Defendants, Sewell Manufacturing Company, and Mrs. Ava F. Sewell in this case No. 3065.

On the same day the court entered its judgment (R. 225)—

> That the 100 shares of the common capital stock of said Sewell Manufacturing Company described in the petition be and it is hereby declared the property of Mrs. Ava F. Sewell.

On July 19, 1945, the day the state court entered this judgment, W. P. Sewell filed in the same court an answer to a suit for a declaratory judgment commenced by his wife on June 25, 1945, with respect to the balance of the block of 950 shares not involved in the bank's suit. (R. 234–236.) Mrs. Sewell alleged in her petition (R. 227–228) that—

> * * * she is the owner of 850 shares of the common stock of said Sewell Manufacturing Company, and brings this suit in order that this Honorable Court may determine the ownership of said stock and in order that the defendant Sewell Manufacturing Company may know to whom dividends are to be paid in the future and

> who is vested with the right to transfer said stock and in order that the other parties hereto may know to whom said stock belongs and to whom dividends are to be paid, * * *

She prayed (R. 229) for a decree—

> * * * that the petitioner is the owner of said 850 shares of stock of the Sewell Manufacturing Company by virtue of a completed gift of said stock to her in 1934; that said Sewell Manufacturing Company shall pay to petitioner all dividends hereafter declared and to be paid on said stock; that since 1934 the said Warren P. Sewell has had no right, title or interest in or to said 850 shares of stock; * * *

In his answer W. P. Sewell expressly admitted the allegations of the petition and added (R. 234) that when he procured the issuance of the certificate in his wife's name,—

> * * * it was his intention to and he understood that he did then effect a completed gift to her of said 950 shares and that thereafter he retained no interest whatever in any portion of said stock thereafter standing in the name of his wife.

He further stated (R. 235) that—

> * * * in any trial o. this issue this defendant will see that there is placed fully before said court all of the evidence which was before the Tax Court of the United States with reference to the ownership of

> said stock, and all other evidence, if any, of every character which may seem to this defendant to be in any way material to a determination of the question 'Who is the owner of the stock?'

The company filed a similar answer on the same day (R. 232–233), and on August 2, 1945, the state court entered its judgment (R. 239–240).

> * * * (1) that in the year 1934 a legally valid and completed gift without any restriction, condition or reservation was made by the defendant, Warren P. Sewell, to the plaintiff, Mrs. Ava F. Sewell, of 950 shares of stock of the Sewell Manufacturing Company, a Georgia corporation, represented by Certificate No. 42 on the stock records of the Sewell Manufacturing Company, said 950 shares embracing the 850 shares in controversy in this suit; (2) that since 1934 the defendant, Warren P. Sewell, has had no right, title or interest in or to any part of said 850 shares of stock here in controversy; and (3) that said 850 shares of stock here in controversy are the property of the plaintiff, Mrs. Ava F. Sewell.

Similar proceedings were had in the state court involving R. B. Sewell (R. 199–214; 242–261).

The court below sustained the decision of the Tax Court and denied the motions to remand for consideration of the proceedings in the state court (R. 270).

DISCUSSION

The decision below is correct on at least several alternative grounds, none of which involves any present conflict of decisions.

1. Assuming, *arguendo,* that the subsequently entered state court decrees are entitled to full consideration, the decision of the Tax Court remains unaffected thereby. From all that appears from the state court proceedings, they adjudicated no more than that the controverted shares were the "property" of the wives only in a technical legal sense. The Tax Court, however, had found that none of the transfers were intended by the taxpayers "to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name." See *supra,* p. 4. There is no necessary contradiction between that finding of the Tax Court and a finding of the state court that "title" or "property" in the shares was in the wives. Since income under Section 22 (a) is to be determined by realities rather than "technical considerations", the state court decrees may be properly ignored. *Cf. Helvering* v. *Clifford,* 309 U. S. 331, 334, 336; *Commissioner* v. *Harmon,* 323 U. S. 44; *Helvering* v.

Horst, 311 U. S. 112; *Harrison* v. *Schaffner,* 312 U. S. 579.

2. Even if the state court decrees herein should be regarded as inconsistent with the Tax Court's findings, such subsequent decrees are not entitled to consideration. They rest, not upon questions of law, but upon issues of *fact,* and once those issues of fact are determined by the Tax Court, such facts should not be subject to re-examination, as it were, by a state court in proceedings in which the Commissioner is not represented.

The situation where a state court determines issues of *state law* is sharply to be differentiated. Thus, *Blair* v. *Commissioner,* 300 U. S. 5 and *Freuler* v. *Helvering,* 291 U. S. 35, relied upon by petitioners, involved state court judgments determining the legal effect of certain trust instruments. Similarly distinguishable are: *Eisenmenger* v. *Commissioner,* 145 F. 2d 103 (C. C. A. 8); *Hubbell* v. *Helvering,* 70 F. 2d 668 (C. C. A. 8); *Nashville Trust Co.* v. *Commissioner,* 136 F. 2d 148 (C. C. A. 6).[4]

[4] In the *Nashville Trust Co.* case, a federal statute permitting a deduction for claims against a decedent's estate was held to refer to state law, and the Circuit Court of Appeals held that the state court's judgment turned on the application of that law. While we differ with the view of the court that the question whether the claims were contracted for an adequate and full consideration in money or money's worth was controlled by state law, it is nevertheless true that

As the court below pointed out (R. 269), and as the taxpayers concede (Pet. 8), the decisions of the Tax Court and the state court in the present case turned on a question of fact; and as the court below further observed (R. 270), there was reason to believe that the decisions of the state court may even have turned upon events occurring after the tax period, which of course could not serve to expunge tax liability incurred during that period.

Sharp v. *Commissioner,* 303 U. S. 624, is not at variance with the decision below that the Tax Court may not be required to substitute for its own findings of fact a contrary view taken by a state court. Although the Circuit Court of Appeals apparently regarded the question decided by the state court as one of fact (91 F. 2d 802, 803–804), in this Court the taxpayer argued and the Commissioner assumed, that the question actually was one of law. (Petitioner's brief, No. 558, October 1937 Term, p. 10; Respondent's brief, p. 6). This Court apparently made the same assumption, since it disposed of the case by a memorandum opinion which cited only the *Freuler* and *Blair* cases.

Nor does *Helvering* v. *Rhodes' Estate,* 117 F. 2d 509 (C. C. A. 8), represent any present conflict

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the court considered the question to have been referred to state law, and considered the state judgment as turning upon a question of state law.

of applicable principles as between the Eighth Circuit and the court below.[5] In that case, the decision of the Eighth Circuit in affirming the Board of Tax Appeals must be viewed in the light of its subsequent decision in *Doll* v. *Commissioner*, 149 F. 2d 239, 244, fn. 10, certiorari denied, October 8, 1945, No. 138, 1945 Term.[6] Certainly, in the light of the *Doll* case, there is no present conflict of decisions between the two circuits on the issue involved herein. Moreover, in the *Rhodes'* case, the Board of Tax Appeals itself gave effect to a state court decree as to the ownership of property.

3. Although we disagree with petitioners as to the existence of a conflict, we do agree that the issue on the second phase of the case is one of importance, which would benefit by clarification in this Court.

Judgments of state courts are being used with considerable and increasing frequency to challenge determinations of federal tax liability. The decisions by this Court in the *Freuler*, *Blair* and *Sharp* cases, *supra*, do not provide explicit answers to all of the problems which commonly

[5] The precise question in the *Rhodes' Estate* case was whether or not an instrument which on its face made an absolute transfer of certain property to the decedent from her children actually was intended to transfer only a life estate. See *Rhodes* v. *Commissioner*, 41 B. T. A. 62.

[6] The *Doll* case was like the instant case, and unlike the *Rhodes' Estate* case, in that it involved the question of who was taxable under Section 22 (a) of the governing Revenue Acts.

attend such challenges. We believe that a state decision to which the Commissioner was not a party is not entitled to controlling weight in litigation of federal tax liability unless the taxpayer makes a clear affirmative showing of all of the following matters: (1) That Congress has expressly or by necessary implication provided that the incidence of the federal tax shall be determined by reference to state law (*United States* v. *Pelzer,* 312 U. S. 399, 402–403); (2) that the state decision necessarily turns on a rule of state *law* inconsistent with that assumed in the determination of federal tax liability, rather than upon a different view of the facts; and (3) that the circumstances of the state judgment are such as to make it a reliable declaration of the state law.

In the court below we did not discuss the manner in which the state decrees had been obtained, beyond pointing out that the pleadings in the suits of the wives, leading to the only decrees which might conceivably be thought relevant,[7] showed that the parties were in complete agreement on every matter covered by the judgments. (R. 232–235; 239–240; 249–254; 259–260). We suggested in the court below that under *Freuler* v. *Helvering, supra,* p. 45, it might be held that the taxpayers were thereby deprived of standing to

[7] The decree in the suits of the bank established only that the wives had title to the stock in 1945, nearly eight years after the close of the tax period. (R. 212, 225).

ask for a remand to the Tax Court for consideration of the manner in which the judgments had been obtained, but the court below did not reach that question.

CONCLUSION

Although we think there is no conflict of decisions, there is room for clarification as to the binding effect of state court decrees on questions of fact. We think that the *Blair* and related cases have proper scope only where the state court in a genuinely adversary proceeding determines a question of state law, as distinguished from issues of fact, and where the federal tax consequences necessarily turn upon the state law. If the Court were disposed to undertake such clarification we would not oppose the granting of the petition.

Respectfully submitted.

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SEWALL KEY,
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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 754.

W. P. SEWELL AND R. B. SEWELL, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY MEMORANDUM FOR PETITIONERS.

The Statement in Respondent's "Memorandum" is more extensive than Petitioner's Statement, and is quite fair. The Memorandum also quite frankly admits the frequency with which State court judgments become material in the determination of Federal tax liability, and Respondent concedes the importance of having this Court make clear the circumstances under which such State court judgments will be accepted as conclusive. It is all the more surprising, therefore, to find the Solicitor General contending, on the ground of tenuous and fallacious arguments, that no conflict exists. This Memorandum is devoted to answering that contention.

1.

The Solicitor General seeks first to show that, even conceding that the State court decrees are entitled to full consideration, the Tax Court judgment would not be affected thereby. To support this thesis, he makes two utterly unauthorized assumptions:

(a) The first unauthorized assumption of the Solicitor General is that the decision of the Tax Court was based on the doctrine of *Helvering* v. *Clifford*, 309 U. S. 331. This argument ignores the fact that the Tax Court decision, both in the Findings of Fact and Opinion, is directed solely to determining whether a valid and completed gift was made by the transfer of the stock, as is clear from the concluding paragraph of the Findings of Fact and the first sentence of the Opinion.

The following paragraph contains the Tax Court's ultimate finding of fact (R. 64):

> "None of the stock transfers in question were intended by the Sewell brothers to vest dominion and control over the shares of stock transferred in their respective wives. It was their intention to retain, and they did retain, that control and dominion in themselves. Each of the wives knew such intention existed, and each impliedly agreed that her husband retain control over the stock in her name. *Completed gifts of the stock certificates so transferred were not made.*" (R. 64) (Emphasis supplied)[1]

The Tax Court's Opinion opens with the following sentence (R. 65):

> "Whether the dividends here in question are taxable to the three Sewell brothers or any of them, or to their respective wives, depends upon whether valid and effectual gifts of the stock were made to the wives."

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[1] The Solicitor General in his omission of the last sentence of the findings from his quotation on Page 9 of his Memorandum entirely overlooks the fact that this is the most significant sentence of the Tax Court's Finding.

The authorities cited by the Tax Court relate exclusively to the essentials of a valid and completed gift. The second case cited by the Tax Court, *Allen-West Commission Co.* v. *Grumbles,* 129 Fed. 287 (C. C. A. 8th), was decided in 1904. The circumstances referred to by the Tax Court as indicating retention of dominion and control by the husband were relied upon solely as evidence of a lack of the donative intent necessary to a valid gift. Nowhere in its Findings or Opinion is there the slightest suggestion that under Sections 11 and 22(a) of the Revenue Acts of 1934 and 1936 the income would remain taxable to the husband if a valid and completed gift had been made. There was no suggestion of reliance upon any cases like the *Clifford, Horst, Schaffner* and *Harmon* cases cited by the Solicitor General (Govt. Memo., pp. 9-10). The idea that any question was considered by the Tax Court other than whether a gift valid under state law had been made is purely imaginative.

(b) The second unauthorized assumption of the Solicitor General is that the State court decree determines merely that the stock was "the 'property' of the wives only in a technical legal sense." The record shows no basis whatever for such an assumption. The State court judgment in each case clearly determined that every right which the husband had in the stock was transferred to the wife.[2]

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[2] The judgment in the suit by Mrs. Ava F. (W. P.) Sewell for a declaratory judgment, for example, decreed (R. 240):

> "It is hereby Ordered, Adjudged and Decreed (1) that in the year 1934 a legally valid and completed gift without any restriction, condition or reservation was made by the defendant, Warren P. Sewell, to the plaintiff, Mrs. Ava F. Sewell, of 950 shares of stock of the Sewell Manufacturing Company, a Georgia corporation, represented by Certificate No. 42 on the stock records of the Sewell Manufacturing Company, said 950 shares embracing the 850 shares in controversy in this suit; (2) that since 1934 the defendant, Warren P. Sewell, has had no right, title or interest in or to any part of said 850 shares of stock here in controversy; and (3) that said 850 shares of stock here in controversy are the property of the plaintiff, Mrs. Ava F. Sewell."

2.

The Solicitor General then urges that, conceding that the judgment of the State court is inconsistent with the Tax Court decree, the circumstance that the State court decree here denied effect involved an issue of fact, prevents the decision of the court below in the present case from being in conflict with the decisions of this Court or of any other Circuit. (Govt. Memo., pp. 10-12). In the Petition it had been pointed out that if any such narrow distinction should be appropriate, there would nevertheless remain a clear conflict between the decision of the court below and decisions in the Eighth and Sixth Circuits, respectively, in the cases of *Rhodes' Estate* v. *Helvering*, 117 F. (2d) 509 (C. C. A. 8th), and *Nashville Trust Co.* v. *Commissioner*, 136 F. (2d) 148 (C. C. A., 6th).

The *Rhodes' Estate* case, *supra*, clearly involved a question of fact,[3] and in that case the Government unsuccessfully urged upon the Eighth Circuit Court of Appeals the same distinction between law and fact relied upon here. To avoid the admission of a present conflict between the case at bar and the *Rhodes' Estate* case, the Solicitor General makes the unfounded suggestion that the *Rhodes' Estate* case has been in effect discredited by the case of *Doll* v. *Commissioner*, 149 F. (2d) 239 (C. C. A., 8th). Actually, the *Doll* case casts no doubt whatever upon the *Rhodes' Estate* case. In the *Doll* case, the Eighth Circuit Court of Appeals did not question the binding effect of the State court decree holding that there was a valid and legal partnership between husband and wife, but simply held that

[3] The State court judgment there involved was a judgment in reformation of an instrument executed ten years prior to the judgment, which instrument clearly purported on its face to convey a fee interest of four-fifths of an estate from children to their mother. The State court decree had reformed the instrument so that it conveyed only a life interest. The State court decree was entered on the strength of oral testimony as to the intention of the parties and as to the mistake of the scrivener. Intention is clearly and admittedly a quesion of fact.

where the income arose from the personal services of the husband, the husband must pay the income tax thereon regardless of the existence of a partnership. The *Rhodes' Estate* case was mentioned only once in the *Doll* case and than in a footnote where it was pointed out that the *Freuler, Blair, Rhodes' Estate* and related cases had no bearing on the question there involved. (149 F. (2d) 239, 244, Footnote 11). Therefore, the decision of the Eighth Circuit Court of Appeals in the *Doll* case leaves completely unaffected its earlier decision in the *Rhodes Estate* case.

The suggestion of the Solicitor General that the State court judgment held controlling by the Sixth Circuit in the case of *Nashville Trust Co. v. Commissioner*, 136 F. (2d) 148, did not turn upon any question of fact, but only upon a question of State law, is without any foundation. The State court judgment there presented, as construed by the Circuit Court of Appeals, determined two questions: (1) that the legacies in question were not gifts but compensations for services, and (2) that the fair value of the services was equal to the value of the legacies—both primarily questions of fact.

It is clearly demonstrated that even if a narrow distinction between fact and law is proper in this field there is clear conflict between the judgment below and the *Rhodes' Estate* and *Nashville Trust Co.* cases. If space permitted, we believe that it could be shown that in the case of *Eisenmenger* v. *Commissioner*, 145 F. (2d) 103 (C. C. A., 8th), and in *Sharp* v. *Commissioner*, 303 U. S. 624, the judgment of the State court depended not entirely upon legal interpretation of written instruments alone, but involved consideration by the State court of evidence as to questions of fact.

Respectfully submitted,

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Wilton H. Wallace,
W. A. Sutherland,
Counsel for Petitioner.